

ALEXANDER M. DUDELSON, ESQ. (AD4809)
26 Court Street - Suite 2306
Brooklyn, New York 11242
718-855-5100
718-624-9552 Fax
Email: adesq@aol.com
Attorney for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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COMMODITY FUTURES TRADING
COMMISSION,

1:18-cv-7895 (GHW)

Plaintiff,

-against-

JASON AMADA and AMADA CAPITAL
MANAGEMENT LLC,

Defendant

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS
MOTION FOR A STAY OF THIS ACTION**

Respectfully Submitted,

ALEXANDER M. DUDELSON, ESQ. (AD4809)
Attorneys for Defendants
26 Court Street - Suite 2306
Brooklyn, New York 11242
(718) 855-5100

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PRELIMINARY STATEMENT:

Defendants Jason Amada (“Amada”) and Amanda Capital Management LLC (“ACM”) hereby do move this Court for an order staying this civil action as against defendants pending resolution of the attendant criminal proceeding, People v. Jason Amada, Indictment No.: 3017-2018.

This motion is made on the ground that a stay of this civil action is necessary to protect defendant Amada’s Fifth Amendment rights in connection with the above-referenced criminal proceeding, which arises from the same underlying facts as this civil action. In addition, the civil action should be stayed as to defendant ACM.

STATEMENT OF FACTS:

On or about August 27, 2018, an impaneled Grand Jury in the Supreme Court of the State of New York, County of New York, indicted defendant Amada after hearing a presentation by the Attorney General of the State of New York (“AG”). The indictment charges defendant Amada with Grand Larceny in the Second Degree in violation of New York Penal Law § 155.40(1); and a Violation of New York General Business Law § 352-c(6). (Exhibit “A”). The criminal indictment does not specify any facts surrounding the charges. To date, no discovery has been exchanged in connection with the criminal proceeding. However, in connection with the indictment, the AG issued a press release. (Exhibit “B”). The press release states, among other things, that:

Attorney General Barbara Underwood today announced a felony indictment charging former stockbroker Jason Ari Amada, 41, of Forest Hills, Queens, with falsely claiming to be a broker who successfully traded foreign currencies through

his company, Amada Capital Management LLC, in order to lure an investor to give him over \$250,000. Amada allegedly executed a contract committing to no loss greater than one percent and that he wouldn't take any commission unless he generated a profit, but still proceeded to engage in an aggressive day-trading strategy that generated over \$150,000 in fees and commissions for himself – while resulting in the loss of over 99% of the investor's money.

* * *

According to the indictment and statements made by the prosecutor at arraignment, in the summer of 2015, Amada allegedly fraudulently solicited a client and promised to save her the exchange fees that she would have otherwise been charged when converting Euros to U.S. dollars in order to purchase an apartment in Manhattan. Amada allegedly misrepresented his professional experience and his company's historical profits and then convinced his client to open an online retail foreign exchange trading account and transfer control of approximately €250,000 to Amada. Amada also allegedly failed to disclose that his broker's license had expired three years prior, in May 2012.

In order to further induce his client to invest, Amada allegedly executed a written contract promising the client that she would not lose more than one percent of the money invested, and that he would only take a commission if the account earned a profit. Contrary to his representations, once he had control of the money, Amada allegedly engaged in an aggressive and speculative day-trading strategy involving foreign currency orders, which generated commissions for Amada regardless of whether the trades resulted in a profit or loss for his client. Within just 45 days, this strategy generated over \$150,000 in fees and commissions for Amada – but resulted in the loss of over 99% of his client's initial investment of €250,000.

In an attempt to conceal the massive losses sustained in his client's account, Amada allegedly transferred some of his commissions back into the trading account – only to lose the money due to his aggressive and speculative trading strategy. Amada also allegedly diverted over \$20,000 to his own personal account, which he used for various personal expenses such as dining and gambling on FanDuel. When confronted by his client about the low balance in her trading account, Amada allegedly created a fake account statement that falsely stated that her account balance was over \$150,000, when in fact it was less than \$3,000.

(Exhibit "B"). Within the press release, the AG commends the Commodity Futures Trading Commission ("CFTC") and Financial Industry Regulatory Authority for their "valuable assistance in the investigation of this case." (Exhibit "B"). On August 29, 2018, plaintiff CFTC

commenced the instant proceeding against defendants Amada and ACM. (Exhibit "C").

Defendant Amada is charged in a criminal indictment with alleged conduct that is identical to the allegations of the CFTC in the instant proceeding. This is not a case of seeking a stay during a pre-indictment investigation. Defendant Amada has in fact been indicted. Defendant Amada will be unable to offer any meaningful defense to the plaintiff's allegations, both on his own behalf and on behalf of defendant ACM, without waiving his Fifth Amendment rights. Only the issuance of a stay of the civil proceeding pending resolution of the criminal matter will preserve defendant Amada's constitutional rights and his ability to defend this action.

ARGUMENT:

I. A STAY OF PROCEEDINGS SHOULD BE GRANTED FOR THE CAUSES OF ACTION AGAINST DEFENDANT AMANDA.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. N. Am. Co., 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936); *accord* Clinton v. Jones, 520 U.S. 681, 706–08, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997); see also United States v. Kordel, 397 U.S. 1, 12 n. 27, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970) (noting that courts may "defer [] civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seem[] to require such action"); Kashi v. Gratsos, 790 F.2d 1050, 1057 (2d Cir.1986) ("[A] court may decide in its discretion to stay civil proceedings when the interests of justice seem to require such action." quoting SEC v. Dresser Indus., 628 F.2d 1368, 1372 [D.C.Cir.1980] [en banc] (ellipses and internal quotation marks omitted)). When faced with parallel criminal proceedings, the analysis should be undertaken "in light of the particular circumstances and competing interests involved in the case" and after consideration of the "extent

to which the defendant's fifth amendment rights are implicated." See Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 98 (2d Cir. 2012) ("A district court may stay civil proceedings when related criminal proceedings are imminent or pending, and it will sometimes be prudential to do so.").

To determine whether to exercise their discretion to stay civil proceedings pending disposition of a criminal case, courts consider a number of factors, including: (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously; (4) the private interests of, and the burden on, the defendants; (5) the interests of the courts and the public. See Crawford & Sons, Ltd. v. Besser, 298 F.Supp.2d 317, 319 (E.D.N.Y. 2004); Church & Dwight Co. v. Kaloti Enterprises of Michigan LLC, No. 07 Civ. 612, 2008 WL 2497345 (E.D.N.Y. June 18, 2008).

A. The issues in the criminal case are identical with those presented in the civil case.

In the matter at bar, the factual issues in defendant Amada's criminal case overlap entirely with those presented in the case before this Court. Mr. Amada's criminal indictment charges one count of Grand Larceny in the Second Degree and one count of a Violation of General Business Law Section 352-c(6), stemming from the same factual allegation in the complaint. The criminal indictment counts span for a period between August 1, 2015 through November 4, 2015. The civil complaint charges a "Relevant Period" from February 2014 through at least November of 2015. Defendant Amada should not be saddled with the impossible burden of attempting to present his civil defense in a manner that protects his Fifth Amendment rights, when the operative facts in the

civil complaint and the indictment mirror each other. See Trustees of the Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc., 886 F.Supp. 1134, 1140 (S.D.N.Y.1995); *accord* Volmar Distributors, Inc. v. New York Post Co., Inc., 152 F.R.D. 36, 39 (S.D.N.Y.1993) (“Proceeding with discovery would force these defendants into the uncomfortable position of having to choose between waiving their Fifth Amendment privilege or effectively forfeiting the civil suit.”). In the instant case, defendant Amada’s Fifth Amendment rights hang in further jeopardy should defendant Amada be faced with the complex burden of presenting a criminal defense regarding the same operative facts, charged over a longer spectrum of time in the civil complaint. As such, defendant Amada’s ability to meaningfully choose to present a civil defense and a criminal defense is irreparably prejudiced in light of the possibility of this conflicting interest – two cases with overlapping factual allegations, and one case including an additional spectrum of time to the same allegations. The prejudice and barrier that may be caused to defendant Amada’s ability to present his civil defense, consistent with the Fifth Amendment, would offend the very risk to self-incrimination the Fifth Amendment is intended to protect.

B. The criminal case is active and the defendant has been indicted.

On August 29, 2018, in the Supreme Court of New York, County of New York, defendant Amada was arraigned on Indictment No.: 3017-2018. (Exhibit “D”). Defendant Amada’s criminal indictment and commencement of proceedings on said indictment favor granting a stay:

A stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct for two reasons: first, the likelihood that a defendant may make incriminating statements is greatest after an indictment has issued, and second, the prejudice to the plaintiffs in the civil case is reduced since the criminal case will likely be quickly resolved due to Speedy Trial Act considerations. See In re Par Pharmaceutical, Inc., 133 F.R.D. at 13 (“The weight

of authority in this Circuit indicates that courts will stay a civil proceeding when the criminal investigation has ripened into an indictment") (citing cases); Parallel Proceedings, 129 F.R.D. at 203–04; Volmar, 152 F.R.D. at 39 (citing Dresser, 628 F.2d at 1375–76); Brock, 109 F.R.D. at 119. Accordingly, stays will generally not be granted before an indictment is issued. See, e.g., Citibank v. Hakim, 1993 WL 481335 (S.D.N.Y.1993) ("Although defendant Hakim allegedly is a target of a continuing grand jury investigation, he does not claim to have been indicted. Accordingly, Hakim's pre-indictment motion to stay can be denied on this ground alone") (citations omitted); Securities and Exchange Commission v. Musella, 38 Fed.Rules Serv.2d 426 (S.D.N.Y.1983) (defendant's pre-indictment motion to stay civil case denied).

Trustees of the Plumbers and Pipefitters Nat'l Pension Fund, supra at 1139-1140; see also In re Par Pharm., 133 F.R.D. 12, 13 (S.D.N.Y. 1990) ("The weight of authority in this Circuit indicates that courts will stay a civil proceeding when the criminal investigation has ripened into an indictment . . . but will deny a stay of the civil proceeding where no indictment has issued.")

C. The Private and Public Interests.

Examination of the interests of the parties weighs in favor of a stay of this proceeding. Plaintiff, like all plaintiffs, does have a legitimate interest in the expeditious resolution of their case. However, plaintiff's interests "are trumped by defendants' interests in avoiding the quandary of choosing between waiving their Fifth Amendment rights or effectively forfeiting the civil case." Trustees of the Plumbers and Pipefitters Nat'l Pension Fund, supra at 1140. It should be noted that plaintiff's counsel advised this Court at the case management conference that plaintiff typically does not take a position on motions in similar proceedings that involve a parallel criminal case.

D. The private interests of, and the burden on, the defendant.

As to the fourth factor, defendant Amada may be forced to choose between exercising his Fifth Amendment right to remain silent and suffering a negative inference should he refuse to

participate in discovery. At the very least, defendant Amada will be forced to incur additional expenses in defending two actions simultaneously, a burden that will likely detract from his being able to expend all his time and resources on his criminal case. Thus, the fourth factor militates in favor of a stay.

E. The interests of the courts and the public.

While the public has an interest in the efficiency of this civil trial, it also has an interest in a fair and prompt resolution in defendant Amada's criminal prosecution. In fact, disposition of the criminal case may make disposing of this one more efficient. See Parker v. Dawson, No. 07 Civ. 1268, 2007 WL 2462677, at *6 (E.D.N.Y. August 27, 2007) ("[I]t is likely that the resolution of the criminal action will, ultimately, further this Court's interest in the efficient disposition of the civil actions."). Additionally, "[t]he public has an interest in ensuring that the criminal process is not subverted" by ongoing civil cases. Morris v. Am. Fed'n of State, Cnty. & Mun Emps., No. 99-cv-5125, 2001 WL 123886 at *2 (S.D.N.Y. February 9, 2001). Moreover, the public's interest in the integrity of the criminal case is entitled to precedence over the civil litigant. See Securities and Exchange Commission v. Shkreli, 15-cv-7175, 2016 WL 1122029 at *7 (E.D.N.Y. March 22, 2016). Absent a stay, this case will proceed to trial parallel to the criminal case, leaving the defendant with no reasonable opportunity to offer a defense. This scenario does not further the public's interest in a justice system that provides a viable means of securing the fair resolution of civil and criminal matters. Conversely, a stay would promote the public interest by providing defendant Amada with a meaningful opportunity to exercise their constitutional rights *and* present a full and complete defense to the allegations in the civil complaint.

II. A STAY OF PROCEEDINGS SHOULD BE GRANTED FOR THE CAUSES OF ACTION AGAINST DEFENDANT ACM.

Civil proceedings should also be stayed against defendant ACM because, as the alleged sole owner and representative of ACM, defendant Amada is the sole person through whom ACM can present a meaningful defense. Absent a stay, the entity defendant will be precluded from offering any meaningful defense. ACM is not even a separate entity; ACM is merely a name by which defendant Amada is alleged to do business. In American Express Bus. Fin. Corp v. RW Prof'l Leasing Serv. Corp., 225 F.Supp.2d 263, 265-266 (E.D.N.Y. 2003), the district court also stayed civil discovery as to the entity defendant, reasoning that the entity defendant would be unable to effectively conduct discovery and mount a defense without the availability of the individual defendants, each of whom were executive officers of the defendant corporation. See also Parker, supra at *7 (“Such a stay is necessary in order to avoid duplication of discovery efforts. . .”); Trustees of the Plumbers and Pipefitters Nat'l Pension Fund, supra at 1141 (declining to “resolve the issue of whether the corporate defendants would be prejudiced by the individual defendants' invocation of their Fifth Amendment rights” because “it is more efficient to grant a complete stay as to all defendants rather than only a partial stay as to the individual ones”); Volmar Distrib., Inc., supra at 41 (“The only real issue is whether it is more efficient for the Court to grant a complete stay as to all defendants until People v. [one indicted defendant] is resolved rather than a partial stay only as to [the indicted individual defendants].”).

CONCLUSION:

For all of the foregoing reasons, Defendants Jason Amada and Amada Capital Management LLC respectfully request that this action be stayed as to the conclusion of the

criminal proceedings against defendant Jason Amada.

Dated: Brooklyn, New York
October 22, 2018


ALEXANDER M. DUDELSON, ESQ. (AD4809)
Attorney for Defendants
26 Court Street - Suite 2306
Brooklyn, New York 11242
(718) 855-5100